No. 5917

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,

v.

HENRY A. JENSEN, Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLEE, HENRY A. JENSEN

GEORGE NEUNER,
United States Attorney.

FRANCIS E. MARSH,
Assistant United States Attorney.

WILLIAM WOLFF SMITH, General Counsel.
J. O'C. ROBERTS, Assistant General Counsel.
JAMES T. BRADY, Attorney, United States Veterans' Bureau.

B. A. GREEN, Portland, Oregon,
Attorney for Appellee.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5917

UNITED STATES OF AMERICA, Appellant,

v.

HENRY A. JENSEN, Appellee

BRIEF OF APPELLEE, HENRY A. JENSEN

STATEMENT OF THE CASE

The facts in this case are not in dispute. Henry Jensen while with the military forces of the United States was granted a ten thousand dollar war risk term insurance policy. This insurance lapsed for non-payment of the premium for the month of June, 1919. Upon June 2, 1927, plaintiff applied to the United States Veterans Bureau for reinstatement and conversion of this lapsed insurance in the full amount. The World War Veterans Act of June 7, 1924, provided that in the event all provisions other than the requirements as to physical condition of the applicant are made, an application for reinstatement may be approved, provided the applicant's disability, if any, is the result of an injury or disease or an aggravation thereof suffered or contracted in the military or naval service during the World War, provided the applicant during his lifetime submits satisfactory evidence to the director showing the service origin thereof, **and that the applicant is not**

totally and permanently disabled. This provision of the Veterans Act became a part of every reinstated application and policy. It is important to bear this in mind, because the law specifically provides that the applicant during his lifetime must submit satisfactory evidence to the director that he is not permanently and totally disabled at the time of the application. Therefore, we **must assume that this portion of the law was complied with before the acceptance of the application.** In other words, here is a positive and affirmative finding as to this man's condition, to-wit, that he was not permanently and totally disabled upon June 2, 1927, or at least July 1, 1927. The policy was issued to this plaintiff, the premiums were paid thereon to and including the month of January, 1928. This of itself means an acceptance of the premiums for a period of six months which carries the policy beyond the contestable clause. The Regional office of the Veterans Bureau at Portland, Oregon, rated the man on December 8, 1927, permanently and totally disabled as of December 7, 1927. Upon May 5, 1928, the director of the Veterans Bureau reviewed the Regional findings and rated this man permanently and totally disabled as of the 19th day of August, 1927. **The plaintiff below was not advised of this fact until June 14, 1928,** or more than six months after the previous rating of December 8, 1927. On June 14, 1928, the director attempted to cancel the policy.

The appellant or defendant below set forth these facts in the answer. The plaintiff filed a demurrer to this answer, and the same was sustained by order

of the court. The offer of proof made by the appellant and the facts pertaining thereto are clearly set forth in the statement of facts as given by the appellant. Judgment was entered for the plaintiff in the sum of $52.91 from December 7, 1928. This judgment was filed June 17, 1929.

ARGUMENT

The court must bear in mind that before a policy could be reinstated proof must be made to the director that the man **was not permanently and totally disabled. This Jensen did during the month of June, 1927.** No fraud or deceit is or can be alleged or claimed.

The case has a practical common sense viewpoint. The law permitted reinstatement prior to July 1, 1927, upon application and proof that the man was not permanently and totally disabled, and upon payment of certain back premiums. Jensen complied with the law. The act is to be liberally construed in favor of the veterans (Jagodnigg vs. United States, 295 Federal 916. United States vs. Cox, 24 Federal 2nd, 944. United States vs. Eliasson, 20 Federal 2nd, 821). He paid his premiums. He was called for examination in December, 1927. He was examined and a permanent and total disability rating given him by the Portland Regional office. Then more than six months elapse and he is told by the director that his rating of total and permanent disability had been made retroactive to August 19, 1926, and therefore he was not entitled to reinstate his policy.

As a practical matter, all of these boys are solely under the control of the Veterans' Bureau. They

are subject to Government ratings except upon contest upon the insurance contract. Their treatments are received from the Government doctors, and the Government doctors in a case such as this attend a man when sleeping and waking, as he walks, as he talks, and as he eats. His every action is subject to the minutest control. The failure to report for examination or failure to accept treatments is subject to punishment. The law permitted reinstatement. The boys were urged time after time to reinstate. A definite program of propaganda was carried on for months to secure by the Government the very things these boys did. It was a process of salesmanship. This man, without reinstatement, had the opportunity to show a permanent and total disability rating from date of discharge. In the place of filing his contest, as hundreds of others have done, upon his original policy of War Risk Insurance, he followed the advice of the defendant and reinstated, paid his money and secured his contract. The defendant now attempts to destroy this policy. The Government surely blows hot and blows cold. Upon July 1, 1927, it said: "You are not permanently and totally disabled." Upon June 14, 1928, it said: "You were permanently and totally disabled August 19, 1926, and ever since said date has been and always will be." Which is true? Even this great Government must have and maintain some little harmony of action.

THE LAW IN THIS CASE

The cases cited by the appellant on pages 10 and 11 of the brief do not show that War Risk Insurance is of a different nature than other insurance, except that it possesses somewhat more liberal features. These liberal features in favor of the men do not extend to the right of the Government to carry on in the manner in which they carried on in the Jensen case. The difference between this Government insurance and the old line insurance comes from the fact that Government insurance is presumed to be without profit. This element of profit, or the carrying charge, being absorbed by the people of this nation in recognition of the service rendered by these men. Otherwise, its features are the same. Jensen could not by virtue of his reinstatement sue upon his original policy of War Risk Insurance (Allen vs. the United States, 33 Fed. (2nd) 888). If the Government is right he now cannot sue upon this reinstatement policy, because they contend he never had such a policy. In other words, the Government, by blowing hot and cold, caused him to reinstate so that he could not sue on his policy of War Risk Insurance, and, second, carried him as to his War Risk Insurance beyond the statute of limitations, and, third, after the happening of these two contingencies, cancelled his reinstated policy and thereafter he is denied relief from any and every angle. Law is presumed to be the rule of reason. Reason does not appear herein.

Appellant lays great stress upon the words "has been in force" and the meaning of these words. This policy was in force until the notice of contest—that

is, the letter of June 14, 1928. True, the policy matured upon the rating of permanent and total disability of December 7, 1927, but the man paid his premium even for the month of January, 1928. The maturity of the policy did not void the policy, and the element of contest did not enter into this case until long subsequent to the six months period provided in the contract. We are unable to follow the appellant's reasoning and cannot but conclude that the policy remained in full force and effect without the element of contest being present until June 14, 1928. **Every affirmative act appearing in this record was the act of the Government.**

Appellant lays great stress upon the fact that Congress by the amendment of an act must have had in mind the rulings of the department which administered this law. It is also a rule of law too well settled for argument that Congress in the amendment of any law is presumed to have in mind the rulings of the United States Supreme Court with respect to the law and the questions involved. The rulings of the Supreme Court are of more force and effect and are paramount to the settled policies of the administrative head of any department of the Government.

The issues are clearly drawn. Either the statement of Honorable Robert S. Bean, district judge in the same case, Jensen vs. the United States, 29 Federal 2d, 951, is correct or it is not correct. There can be no middle ground. We feel that it would be futile for us to attempt to improve upon the statement given in this case. We quote a portion of this opinion:

"The position of the Government is that the permanent and total disability of the plaintiff within the six months' period matured the policy and it was not thereafter "in force," and therefore the incontestable provisions of the law had no application, and such seems to be the ruling of the Comptroller General in Philip McNish (7 Decisions Comptroller 551). But I am unable to distinguish this case from Mutual Life Ins. Co. v. Packing Co., 263 U. S. 167, 44 S. Ct. 90, 68 L. Ed. 235, 31 A. L. R. 102, and Jefferson Standard Life Ins. Co. v. McIntyre (C. C. A.) 294 F. 886, holding that the death of an insured does not stop the running of the incontestable provision of a life policy, for the reason that it does not terminate the contract of insurance, which upon the death of the insured immediately inures to the benefit of the beneficiary.

"So here the fact that the insured became totally and permanently disabled within the six months' period did not terminate the insurance. The insurance was payable in 240 equal monthly payments. Section 512, 38 U. S. C. A. The permanent and total disability of the insured merely fixes the date when the monthly payments should commence. The contract itself continues in force until the plaintiff has received the full benefit thereof unless his disability ceases in the meantime. If the government should refuse at any time to make such payments and the plaintiff elects to bring action to recover the same, he would necessarily be compelled to rely on the contract of insurance as a basis for his action. It is suggested that since war risk insurance differs from commercial life insurance, in that it is an insurance against both death and total disability, and may be reinstated at a time when the insured is suffering from service con-

nected temporary total disability, the rule applicable to commercial insurance is not controlling, in the constructions of section 307 of the World Veterans' Act. But war risk insurance is not a gratuity but a contract between the insured and the government, and the rights of the parties are to be ascertained from the terms of their contract. St. Bank & Trust Co. v. U. S. (C. C. A.) 16 F. (2d) 439. The provisions of section 307 are, I take it, to be construed and determined by the applicable rules to similar provisions in any other contract of insurance."

We submit the judgment should be sustained.

B. A. GREEN,
Attorney for Appellee.